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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 19....

No. 77-1449

STATE OF NORTH DAKOTA,
Plaintiff and Respondent,

vs.

VERNON RAY OLMSTEAD,
Defendant and Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of North Dakota

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VERNON RAY OLMSTEAD,
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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of North Dakota

Petitioner, Vernon Ray Olmstead, respectfully prays that a Writ of Certiorari issue pursuant to Rules 19-27 of the Supreme Court Rules to review the judgment of the Supreme Court of the State of North Dakota in the above-entitled case decided below as *State v. Olmstead*, 261 N.W. 2d 880 (ND 1978).

OPINIONS BELOW

The judgment and opinion of the North Dakota Supreme Court in *State v. Olmstead*, 261 N.W. 2d 880 (ND 1978) was filed on January 11, 1978, and made final on January 27, 1978. This opinion upheld the denial of the Petitioner's motion for a

new trial. In two prior opinions, the North Dakota Supreme Court denied the Petitioner's motion for release pending appeal (*State v. Olmstead*, 242 N.W. 2d 644, ND 1976), and affirmed the Petitioner's conviction but reinstated his motion for a new trial and remanded (*State v. Olmstead*, 246 N.W. 2d 888, ND 1976). All three opinions are reprinted in the Appendix to this petition as is the transcript of the verdict of the trial judge, said opinions and transcript of verdict appearing at pages A-1, A-16, A-28, and A-35 respectively.

JURISDICTION

The judgment sought to be reviewed was filed on January 11, 1978 and made final on January 27, 1978. No petition for rehearing was filed nor was any order granted extending the time in which to file the petition for a Writ of Certiorari.

The statutory authority for issuance of a Writ of Certiorari is 28 USC § 1257(3), which authorizes review of final judgments of the highest court of a state when any title, right, privilege, or immunity is specially set up or claimed under the Constitution or statutes of the United States. Petitioner claims that the rights granted to him under the First and Fourteenth Amendments to the United States Constitution were denied him.

QUESTIONS PRESENTED FOR REVIEW

Whether comments by the trial judge on the religious practices of the Petitioner denied him the rights guaranteed under the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent sections of the Constitution of the United States involved herein are:

First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment:

Section I: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The essential facts in this case were summarized by the North Dakota Supreme Court in the second of its three opinions, *State v. Olmstead*, 246 N.W. 2d 888 (ND 1976), as follows:

> "The rape victim testified that she was raped in a vacant lot by a young man then unknown to her, on June 27, 1975. She was with him for half an hour, conversed with him, and saw, by the light of the moon, his face, the knife he used to threaten her, and the color of his clothes and boots. About two weeks later, while in a restaurant within a few blocks of the place where the rape occurred, she saw the defendant working in the kitchen and identified him as the rapist. At the trial, her testimony was the only evidence identifying the defendant. A police drawing based upon her description before she identified the defendant shows

some similarity to him. A search of the apartment of the defendant and his wife uncovered a steak knife similar to the one described by the victim, but no clothing closely matching her description of what the rapist wore.

The defendant's alibi defense was supported by his wife and by five persons who testified that they had attended a movie and prayer meeting at the Grand Forks Mission with the defendant and his wife the evening of June 27. The meeting lasted until after midnight. All five testified that the defendant and his wife planned to go to a local carnival to hand out religious tracts, and two of the five testified that they accompanied the defendant and his wife to the carnival and that the four 'witnessed' there until after 1 a.m. The rape was positively shown to have occurred between midnight and 1 a.m." 246 N.W. 2d 888, 889.

The case was tried to the court in November of 1975. The trial judge announced his verdict on November 14, 1975, at which time the remarks were made in denial of the Petitioner's constitutional rights. As to some of the post-trial matters, the North Dakota Supreme Court summarized them as follows:

> "Olmstead was represented by Attorney Evan F. Heustis at the trial. Shortly after the trial, John H. Moosbrugger, who had been engaged by Olmstead's parents, became Olmstead's counsel. Moosbrugger moved, . . . for a new trial . . ., and then moved to withdraw that motion. Attorney David Kessler, who had been engaged by Olmstead's wife, appeared at the hearing on the motion to withdraw the motion for new trial, and resisted that motion in behalf of Mrs. Olmstead. Moosbrugger's motion to withdraw the motion for new trial was granted. . . .
>
> Olmstead then dismissed Moosbrugger and appointed Kessler to represent him. Kessler moved to reinstate the motion for new trial and for release pending appeal. Both motions were denied. Kessler prepared Olmstead's appeal . . . This Court heard Olmstead's motion for release pending appeal and a divided court denied the motion. . . . Next we heard arguments on Olmstead's appeal from the conviction and sentencing, and from the order denying reinstatement of the motion for new trial. A unanimous court affirmed the conviction, but reinstated the motion for new trial and remanded for consideration by the trial court of the original motion for new trial . . ." 261 N.W. 2d 880, 881, 882.

The motion for a new trial was denied and Robert O. Wefald took the Petitioner's appeal to the North Dakota Supreme Court.

The comments, which the Petitioner contends constitute religious bias, were made by the trial judge in the course of announcing his verdict the day after the conclusion of the trial of the case to the court (November 14, 1975). The trial judge held that the evidence could not be reconciled as to the time factor and that "It's the Court's opinion that testimony as to going out to the carnival to witness for the Lord after 12:15 a.m. is incredible and defies common sense beyond good judgment" and that even "if there was any witnessing done for the Lord out at the carnival setting that evening, the only reconciliation that is reasonable is that such (was the?) time for the defendant and his wife to return to their apartment." The North Dakota Supreme Court found no religious bias in the trial judge's remarks, although it concluded that "The statement was, at most, UNDIPLOMATIC." (Emphasis supplied, Appendix page A-12)

The Petitioner, who has an organic brain dysfunction is an enlisted member of the United States Air Force. He is married and has no children. He has served the sentence imposed upon him in the North Dakota State Penitentiary and has been paroled. He has been returned to active duty pending the outcome of this petition. If his conviction stands, he faces discharge from the United States Air Force.

STAGE OF PROCEEDINGS AT WHICH QUESTION WAS RAISED

The question of the bias of the trial judge and denial of the Petitioner's constitutional rights was first raised in the Petitioner's brief on appeal to the North Dakota Supreme Court which ignored the issue and remanded the case for further proceedings (246 N.W. 2d 888). North Dakota Rules of Appellate Procedure do not require specifications of error, hence all issues on appeal are raised in the appellate briefs. The question was finally specifically addressed by the North Dakota Supreme Court in its most recent opinion in this case (261 N.W. 2d 880).

REASONS FOR ALLOWANCE OF WRIT

The Decision of the North Dakota Supreme Court That the Comments of the Trial Judge Were, at Most, Undiplomatic, Is Not in Accord With the Letter, Spirit and Intent of Applicable Decisions of This Court.

The Writ of Certiorari ought to be issued pursuant to Rule 19(a) of the Supreme Court Rules because the North Dakota Supreme Court has decided the question raised in a way not in accord with the applicable decisions of this Court. The essential question is one of the religious bias of the trial judge. This Court has refused to tolerate prejudicial judicial bias. In *Johnson v. Mississippi*, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed. 2d 243 (1971), this Court held that:

> "Trial before 'an unbiased judge' is essential to due process." 403 U.S. 212, 216.

See also *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 2d 532 (1971).

In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 2d 83 (1972), this Court held:

> "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it. Thus, it has been invoked in trials to a judge." 407 U.S. 493, 502.

The North Dakota Supreme Court acknowledged these decisions and held that "trial before an unbiased judge is essential to due process . . . and this means that courts should avoid

even an appearance of bias . . ." (261 N.W. 2d 880, 884), however, it simply refused to conclude that the trial judge's remarks created even the slightest appearance of bias although it did hold that "the statement was, at most, *UNDIPLOMATIC*" (emphasis supplied. 261 N.W. 2d 880, 885). This holding by the North Dakota Supreme Court is a matter of law and not a matter of fact, and as a matter of law, it is contrary to the spirit, letter, and intent of the applicable decisions of this court.

The North Dakota Supreme Court held that it did "not attribute a bad motive to a remark by an experienced, capable trial judge, made at the conclusion of a difficult trial during which he displayed complete fairness." (261 N.W. 2d 880, 885). The Petitioner does not attribute a bad motive to the remarks of the trial judge, in fact, we believe he was being perfectly candid. This Court does not, however, require showing a bad motive before prejudicial bias can be found; rather just the "appearance of bias" can deny due process.

The trial of this case began at 10:30 a.m. on November 12, 1975, and concluded except for closing arguments at approximately 4:30 p.m. on November 13, 1975. The trial judge did not announce his verdict until 2:00 p.m. on November 14, 1975. Having had an opportunity to carefully consider the case, there is no evidence that his remarks were less than well prepared or carefully chosen. In fact, the first eight or nine pages of the transcript of his decision indicate thorough preparation. The evidence suggests that the remarks of the trial judge of which the Petitioner complains were not inadvertent or made in haste—he obviously meant exactly what he said.

A fair and open reading of the remarks of the trial judge reveals that he candidly displayed the bias of his thoughts and beliefs without any hint of bad motive. The trial judge's expression of what did or did not make "common sense" to him reveals the extent of his cultural and religious bias.

At the time the crime was committed, there was a carnival in town out at the fairgrounds which remained open until 1 a.m. each evening. It simply does not "defy common sense beyond good judgment" that people would be attending the carnival until 1 a.m., notwithstanding the apparent opinion of the trial judge. In fact, it is doubtful that the carnival would remain open until 1 a.m. if people were not out there to patronize it even though that apparently makes no sense to the trial judge. The cultural bias of the trial judge is even more apparent when he stated that by carrying his common sense approach a step further, he determined that the only reasonable thing for the Petitioner and his wife to be doing at that time of the morning was to be returning to their apartment. In other words, because of the trial judge's cultural beliefs and bias, he totally discounted the Petitioner's witnesses as to their crucial testimony placing the Petitioner at the fairgrounds at the time of the crime. Curiously enough though, the trial judge did believe the witnesses and their testimony about being with the Petitioner at the religious coffee house until midnight. The trial judge, like the Fairy Godmother, expected the Petitioner, like Cinderella, to promptly head for home at midnight. The Petitioner's punishment for failing to respond in accordance with the trial judge's perception of common sense is that his witnesses were discredited only as to the crucial events after midnight leaving the Petitioner defenseless against the uncorroborated accusations of the complaining witness. The Petitioner was branded as a felon and a rapist and confined to the penitentiary because his actions after midnight defied the trial judge's perception of "common sense beyond good judgment."

The foregoing principally shows cultural bias. However, the remark by the trial judge that "It's the Court's opinion that testimony as to going out to the carnival to witness for the Lord after 12:15 a.m. is incredible and defies common sense beyond good judgment" demonstrates his religious bias. The North

Dakota Supreme Court held that the first part of this phrase only pointed out which testimony the trial judge found to be incredible. For the sake of argument, we can say that this testimony as to "going out to the carnival to witness for the Lord after 12:15 a.m." may or may not be credible depending upon the trial judge's reaction to the witnesses, but it *CANNOT* be said to "defy common sense beyond good judgment."

There may be circumstances in which the trial judge may conclude that the testimony of a witness does not square with common experience or is very remote or of an extremely low order of probability or borders on fantasy, but as pointed out above, simply being out at a carnival from midnight to 1 a.m. or the decision of a couple to go somewhere after a meeting instead of returning home is not uncommon, unbelievable, inconceivable, nor does it defy common sense, nor is it beyond good judgment. Going out to the carnival at that time of morning to distribute religious literature and to witness for the Lord may be hard to accept and it may not be a common form of activity, but it simply does happen even though most people with the trial judge included, would not agree with that religious practice. This court has decided many cases involving religious practices that deviated from the then prevailing norm. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1028 (1943) (Salute and Pledge of Allegiance); *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963) (required reading of Bible verses unconstitutional), *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed. 2d 601 (1962) (required reading of prayers in classrooms unconstitutional), *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (requirement of license to distribute "religious" literature held unconstitutional); *Niematko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951) (requirement of permit to use park for Bible talks violated Jehovah's Witnesses

First Amendment rights); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972) (religious beliefs of Amish that children not to attend school past eighth grade upheld).

The remarks of the trial judge were more than simply "undiplomatic," they were religiously and culturally biased depriving the Petitioner of his rights to due process and religious freedom. Justice demands that the Petitioner be given a new trial before an unbiased trier of fact.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendices

STATE of North Dakota, Plaintiff
and Appellee,

v.

Vernon Ray OLMSTEAD, Defendant
and Appellant.

Crim. No. 610.

Supreme Court of North Dakota.

Jan. 11, 1978.
(261 N.W.2d 880)

Defendant's conviction of rape was affirmed, 246 N.W.2d 888, and subsequently, the District Court, Grand Forks County, A. C. Bakken, J., denied his motion for a new trial. Defendant appealed. The Supreme Court, Pederson, J., held that: (1) the trial judge's comment that defendant's alibi testimony "as to going out to the carnival to witness for the Lord after 12:15 a.m. is incredible and defies common sense beyond good judgment," did not display improper religious bias; (2) where defendant stipulated to the use of the results of a polygraph examination, the results were admissible, and (3) the evidence was sufficient to sustain the conviction.

Affirmed.

1. Constitutional Law Key 268(8)

Trial before unbiased judge is essential to due process and court should avoid even appearance of bias.

2. Criminal Law Key 31

Alibi is valid defense.

3. Criminal Law Key 656(6)

In prosecution for rape, trial judge's comment that defendant's testimony, "as to going out to the carnival to witness for the Lord after 12:15 a.m. is incredible and defies common sense beyond good judgment," did not display improper religious bias.

4. Stipulations Key 14(7)

Where defendant stipulated to admission of results of polygraph examination on his motion for new trial, results were admissible.

5. Stipulations Key 13

Whether relief from stipulation will be granted rests in sound discretion of trial court.

6. Criminal Law Key 956(1)

Question of whether polygraph may be used to assist judge in determining whether to grant motion for new trial is different matter than question of admissibility at trial to show guilt or innocence.

7. Rape Key 51(1)

Evidence was sufficient to sustain conviction of rape.

8. Criminal Law Key 935(1)

It is not abuse of discretion on part of trial judge to deny motion for new trial on ground of insufficiency of evidence where there is substantial evidence to support decision.

Wheeler, Wolf, Wefald & Peterson, Bismarck, for defendant and appellant, and David Kessler, Grand Forks, of counsel; argued by Robert O. Wefald, Bismarck.

Thomas B. Jelliff, State's Atty., Grand Forks, for plaintiff and appellee.

PEDERSON, Justice.

This is an appeal from an order denying a motion for new trial in a case that we are now considering for the third time. Vernon Ray Olmstead was convicted of having committed, on June 28, 1975, "rape in the first degree," in violation of § 12-30-01(1) and (4) and § 12-30-04(2), NDCC.[1] Olmstead had waived a jury and, after a four-day trial, he was found guilty by the District Court of Grand Forks County and sentenced to five years in the state penitentiary.

Olmstead was represented by Attorney Evan F. Heustis at the trial. Shortly after the trial, John H. Moosbrugger, who had been engaged by Olmstead's parents, became Olmstead's counsel. Moosbrugger moved, pursuant to Rule 33, NDRCrimP, for a new trial (the contents of which motion will be described hereinafter), and then moved to withdraw that motion. Attorney David Kessler, who had been engaged by Olmstead's wife, appeared at the hearing on the motion to withdraw the motion for new trial, and resisted that motion in behalf of Mrs. Olmstead. Moosbrugger's motion to withdraw the motion for new trial was granted.

Olmstead asked that he be "evaluated" at the state mental hospital and this was ordered as a part of the presentence investigation under Rule 32(c)(2), NDRCrimP.

Olmstead then dismissed Moosbrugger and appointed Kessler to represent him. Kessler moved to reinstate the motion for new

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[1] Repealed by § 41, Ch. 116, S.L.1973, effective July 1, 1975. Sex offenses have been redefined in Ch. 12.1-20, NDCC.

trial and for release pending appeal. Both motions were denied. Kessler prepared Olmstead's appeal "from the Judgment of conviction against him of the offense of first degree rape and the sentence imposed thereon . . . [and] from the Order denying Defendant's application to reinstate Motion for new trial . . ." This Court heard Olmstead's motion for release pending appeal and a divided court denied the motion [*State v. Olmstead*, 242 N.W.2d 644 (N.D.1976)]. Next we heard arguments on Olmstead's appeal from the conviction and sentencing, and from the order denying reinstatement of the motion for new trial. A unanimous court affirmed the conviction, but reinstated the motion for new trial and remanded for consideration by the trial court of the original motion for new trial, subject to the stipulations made by Attorney Moosbrugger and the state's attorney (*State v. Olmstead*, 246 N.W.2d 888 (N.D. 1976)).

The reinstated motion sought a new trial in the interest of justice, specifying the following reasons:

(1) Olmstead proposes to take a polygraph test and agrees that the results thereof be admitted, and that the examiner shall be examined and cross-examined at the hearing on the motion;

(2) Olmstead desires to testify in his own behalf;

(3) Additional alibi witnesses are now available;

(4) Olmstead desires a mental evaluation at the state mental hospital;

(5) There is information available concerning the instability of the complaining witness which should be brought to the attention of the court;

(6) The State has within its control physical evidence which tends to clear the defendant, which the court has not seen;

(7) The evidence presented at the trial was insufficient to sustain a judgment of conviction.

At the beginning of the hearing on this motion for new trial, Olmstead declined the court's offer to permit amendment thereof. During the hearing the following evidence was taken regarding each of the reasons set forth in the motion:

(1) The State presented testimony, which the court admitted over defendant's strong objection, concerning the polygraph test.

(2) Olmstead testified in his own behalf, denied committing the offense and, as at the trial, presented an alibi as his principal defense.

(3) Additional alibi witnesses were called and testified in support of Olmstead's alibi that the could not have committed the offense because he was elsewhere during the entire period when the crime was being committed.

(4) The results of the state mental hospital evaluation were introduced.

(5) No information was offered relating to the alleged instability of the complaining witness.

(6) No information was offered relating to any physical evidence under the control of the State which would tend to clear Olmstead.

(7) Argument was made that the evidence was insufficient to sustain the conviction.

During Olmstead's testimony, he gratuitously stated: "The whole basis of me getting a new trial was a lie detector test, that was the whole basis." Needless to say, the polygraph test results indicated deception when Olmstead denied committing the offense. Counsel called two experts who testified concerning the unreliability of the polygraph results, especially with regard to persons who have certain brain disfunctions such as those suf-

fered by Olmstead. This testimony is contradicted, in part, by the state hospital evaluation which was received without objection.

The trial court heard extensive arguments by counsel for Olmstead and for the State, made a comprehensive statement of its analysis of the issues before it, and concluded with:

> ". . . the only logical and reasonable conclusion to be made after hearing the evidence in the motion for new trial is that the proof of the defendant's guilt beyond a reasonable doubt which was established at the trial from approximately November 11 to November 14, 1975, has now been established beyond all doubt."

The motion for new trial was denied, Olmstead appealed from that denial, and we affirm.

Olmstead has again changed counsel and, on this appeal, is represented by Robert O. Wefald, who argues the following issues:

I. Whether the religious bias of the trial judge denied the defendant-appellant the constitutional rights guaranteed him under the First and Fourteenth Amendments to the Constitution of the United States and Section 4 of the Constitution of the State of North Dakota.

II. Whether it was proper to consider testimony from a polygraph examination in spite of a claim of the lawyer-client privilege.

III. Whether in light of all the evidence it was proper for the trial court to deny the motion for new trial.

Although the appeal before us now is only from the order denying a new trial and no issue of bias or constitutional rights was raised by the motion for new trial, we conclude that there

was an alternative motion for relief under the Uniform Post-Conviction Procedure Act (Chapter 29-32, NDCC), and we have said that this Act permits any attack, direct or collateral, upon a judgment, which might otherwise have been available under any common law, statute or other writ, motion, petition, proceeding or remedy. *State v. Carmody*, 243 N.W.2d 348 (N.D.1976). Accordingly, we will consider all issues raised, directly or collaterally, even though they may have no relationship to the denial of the motion for new trial. We do not mean to abandon what we said in *State v. Haakenson*, 213 N.W.2d 394, 398 (N.D.1973):

> "Appeals from orders denying motions for new trial will ordinarily be appropriate only where the order itself is a final determination of the action, as where a motion for new trial on the ground of newly discovered evidence is denied after the time for appeal from the judgment has passed."

See, also, Explanatory Notes following Rule 33, NDRCrimP. See, also, *State v. Erickson*, 231 N.W.2d 758, 761 (N.D.1975).

RIGHT TO IMPARTIAL, UNBIASED TRIER OF FACT

In announcing its verdict, the trial court, apparently using standard jury instructions as a guide, addressed the defendant on matters concerning the applicable law, the burden of the State, reasonable doubt, the weighing of evidence, circumstantial evidence, credibility of witnesses, and other matters which the trial court described as the basic rules which apply to criminal cases. From these observations, reported in eight pages of the transcript, Olmstead quotes, out of context, the following:

> "The Court is of this opinion that this evidence can be reconciled in part. It can be reconciled by accepting the

testimony of the defendant's wife and corroborating witnesses as to the defendant being at the coffee house on the night of June 27, 1975. It cannot be reconciled as to the time factor. It's the Court's opinion that testimony as to going out to the carnival to witness for the Lord after 12:15 a.m. is incredible and defies common sense beyond good judgment."

At one point in the statement, before making the above comment, the trial court had stated:

"An instruction which certainly has great importance in this case relates to weight and credibility of testimony given by witnesses.

"The jury or the Judge in this case is the judge of all questions of fact. The jury or the Judge alone must weigh the evidence under these instructions and determine the credibility of those who have testified. And in performing this task the jury or the Judge may consider those facts and circumstances in the case which tend to strengthen, weaken or contradict one's testimony. The jury or the Judge may consider the age, intelligence and experience of the witness, the strength or weakness of his recollection, how he came to know the facts to which he testified, his possible interest in the outcome of the trial, any bias or prejudice he may have, his manner and appearance, and whether he was frank or evasive while testifying, and whether his testimony is reasonable or unreasonable.

"If it's found that there is a conflict in the evidence, the Judge or the jury should reconcile it, if it's possible, because each witness is presumed to have told the truth. If this cannot be done, the jury or the Judge has the right to determine whom of the witnesses he will believe in whole or in part. And I believe this should be emphasized, that the jury or the Judge should give credible tes-

timony its just and fair weight and should consider the evidence in the case in the light of his common sense and ordinary experience and observation of human affairs. If the Jury or the Judge concludes that a witness has knowingly testified falsely concerning any material matter, he has the right to distrust such witness's testimony in other particulars and may reject all the testimony of that witness and give it such weight and credibility as he thinks it deserves.

"The test is not which side produces the greater number of witnesses or presents the greater quantity of evidence, but rather which testimony and what evidence convinces the jury or the Judge as being more accurate and otherwise trustworthy."

The court then discussed specific items of testimony, such as that of the complainant, evaluating its consistency and credibility, and pointed out some inconsistencies. In commenting on the testimony of alibi witnesses for the defense, the court likewise pointed out consistencies and inconsistencies and, immediately before making the observation which Olmstead finds objectionable, said:

"The Court, if there is a conflict in the evidence, which is obvious, it must be reconciled if possible because each witness is presumed to have told the truth. If it cannot be reconciled, the Judge has the right to determine whom he will believe in whole or in part."

Immediately after the remarks which Olmstead says prove religious bias, the trial court said:

"Carrying that a step further if there was any witnessing done for the Lord out at the carnival setting that evening, the only reconciliation that is reasonable is that such time for the defendant and his wife to return to their apartment. The defendant's wife testified he left the apart-

ment and the witness Sissy Williams, I believe, testified that he came to her apartment and knocked on the door about 1:30 that morning of June 28th and that he stayed there a half an hour and the Court asked her specifically what was the urgency of his visit. She said to tell her to pray for some homosexual and for someone who was deadly ill from cancer and this witness Williams had met this woman only very briefly on one occasion.

"It appears to the Court that this was an attempt on the part of the defendant to establish an alibi and to account for his time."

Olmstead argues that a fair reading of the remarks of the trial court indicates that the sole basis for discounting the defense testimony was the court's unwillingness "to accept the religious practices of these witnesses." Counsel for Olmstead acknowledged, during oral argument before this Court, that the court could have validly said, "the testimony is not credible," but he argues that, in effect, the trial judge said, "I don't believe that it is good religious practice to witness for the Lord at a carnival between 12:30 and 1:00 o'clock in the morning." We do not read the comment in that manner. If alibi testimony which involves a religious activity must be believed, few convictions could occur—it would be everyone's alibi.

[1] We readily acknowledge that trial before an unbiased judge is essential to due process [*Johnson v. Mississippi*, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971)], and that this means that courts should avoid even an appearance of bias [*Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972)]. See, also, Canons 1, 2 and 3, Code of Judicial Conduct, and *State v. Weippert*, 237 N.W.2d 1 (N.D.1975).

Section 4 of the Constitution of North Dakota provides:

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference,

shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

Article I of the Amendments to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article XIV of the Amendments to the United States Constitution prohibits states from doing those things which Article I prohibits Congress from doing.

[2] An alibi is a recognized, valid defense in this State. *State v. Lyon*, 59 N.D. 374, 230 N.W. 1 (1930); *State v. Gates*, 51 N.D. 695, 200 N.W. 778 (1924); *State v. Nelson*, 17 N.D. 13, 114 N.W. 478 (1908). See, also, Rule 12.1, NDR CrimP.

[3] In 75 Am.Jur.2d Trial, § 733, it is stated:

"In general, the defense of alibi is not one requiring that the evidence given in support of it be scrutinized otherwise or differently from that given in support of any other issue in the case, . . ."

Olmstead presents the novel argument that because his alibi placed him away from the scene of the crime, "witnessing for the Lord," the trial court's comment of disbelief of the testimony displays religious bias.

When considering all of the comments by the trial court, including the remark, "It's the Court opinion that testimony as to going out to the carnival to witness for the Lord after 12:15 a.m. is incredible and defies common sense beyond good judgment," we conclude that no religious bias was displayed. The descriptive phrase "as to going out to the carnival to witness for the Lord after 12:15 a.m." identifies which *testimony* the court found to be incredible and which defied common sense beyond good judgment. It does not explain "why" it was deemed incredible. It may have been the demeanor of those who testified, or the inconsistencies, or the unusual total recall of certain events and exact times of occurrences from a remote and insignificant time in the past. We do not attribute a bad motive to a remark by an experienced, capable trial judge, made at the conclusion of a difficult trial during which he displayed complete fairness. The statement was, at most, undiplomatic. See *State v. Weippert*, 237 N.W.2d 1 (N.D.1975).

> "The purpose of reviewing a judgment in a criminal action is not to determine whether the record is perfect, but to determine whether the defendant has had a fair trial under the law and whether his conviction is based upon evidence establishing his guilt beyond a reasonable doubt." *State v. Marmon*, 154 N.W.2d 55, 64 (N.D.1967).

See, also, *State v. Allen*, 237 N.W.2d 154, 162 (N.D.1975); *State v. Iverson*, 187 N.W.2d 1, 44 (N.D.1971); *Michigan v. Tucker*, 417 U.S. 433, 446, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

No violation of Section 4 of the North Dakota Constitution or Articles I and XIV of the Amendments to the United States Constitution has been shown. Cases (primarily from Michigan[2]) cited by Olmstead, or discovered by this Court, involving the questioning of witnesses about their religion, have no bearing upon the issue before us.

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[2] E.g., *People v. Hall*, 391 Mich. 175, 215 N.W.2d 166, 76 A.L.R.3d 523 (1974).

POLYGRAPH EXAMINATION

In the only case in this State where "lie detector" evidence was offered to prove guilt or innocence, this Court held that the evidence was inadmissible. *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1951). Later, in *State v. Swanson*, 225 N.W. 2d 283, 285 (N.D.1975), where the trial court had rejected defendant's attempt to introduce evidence of his willingness to take a polygraph test, we said:

> "This court may be required to re-examine its decision in *State v. Pusch, supra*, if presented with an appropriate record. Such a record is not present in this case."

[4] The instant case likewise fails to present us with an appropriate record upon which this Court can base a re-examination of the question—nor is this a case in which the decision in *Pusch* can be applied. Here, Olmstead's counsel and the prosecutor had stipulated (as we pointed out in *State v. Olmstead*, 246 N.W.2d at 891, *supra*) that, for the purpose of the motion for new trial, Olmstead would submit to a polygraph test and the results would be admissible, and that the polygraph operator would be examined and cross-examined. Olmstead, himself, never indicated that his counsel was not following his instructions in entering that stipulation and, while testifying at the hearing on his motion for new trial, confirmed that "the whole basis of me getting a new trial was a lie detector test." Additionally, Olmstead, himself, introduced the results of a previous, separate polygraph examination (which also indicated deception when he denied committing the rape). We assume that the stipulation is not disputed and should be enforced by the court when no good cause is shown to the contrary. The fact that the results were unfavorable rather than favorable is not a good cause.

> "The stipulation is in the nature of a contract and a party may not be relieved therefrom without first making

application to the court and upon a showing of good cause." *Bjerken v. Ames Sand and Gravel Company*, 206 N.W.2d 884, 888 (N.D.1973).

See, also, *Lawrence v. Lawrence*, 217 N.W.2d 792 (N.D.1974).

[5, 6] Whether relief from a stipulation will be granted rests in the sound discretion of the trial court. *Northern Pac. Ry. Co. v. Barlow*, 20 N.D. 197, 126 N.W. 233 (1910). No abuse of discretion is indicated here. Rule 502, NDREv, does not prohibit waiver of the lawyer-client privilege. His own statement at the motion hearing denies merit to Olmstead's argument that there was "no knowing waiver." We also agree with the majority in *People v. Barbara*, 400 Mich. 352, 255 N.W. 2d 171 (1977), when they said that the question of whether polygraph may be used to assist a judge in determining whether to grant a motion for new trial is a different matter than the question of admissibility at a trial to show guilt or innocence.

MOTION FOR NEW TRIAL

[7] Rule 33, NDRCrimP, superseded all of Chapter 29-24, NDCC, including § 29-24-02 which itemized the exclusive grounds upon which new trials in criminal cases could be granted. Now the ground for new trial is "in the interest of justice." It is necessary, however, to "point out with particularity the defects and errors complained of." One of the grounds for new trial under § 29-24-02 was: "When the verdict is contrary to law or clearly against the evidence." Even though insufficient evidence to sustain the conviction more readily justifies a motion for judgment of acquittal under Rule 29, NDR CrimP, Olmstead exercised his prerogative to point it out as a defect or error under Rule 33. See *State v. Holy Bull*, 238 N.W.2d 52 (N.D.1975).

The question of sufficiency of evidence to sustain the conviction was squarely before this Court and was decided in *State v. Olmstead*, 246 N.W.2d 888, *supra*. We said that there was competent and substantial evidence (although controverted) sufficient to support Olmstead's conviction. Matters testified to at the hearing on the motion for new trial could in no way diminish the evidence presented at the trial. Some testimony serves to reassert a defense which failed at trial. Other testimony elicited at the motion hearing is at least as devastating to Olmstead's cause as any of the trial evidence. Accordingly, we reaffirm our determination that the evidence does sustain the conviction.

As we stated in *Holy Bull*, *supra*, 238 N.W.2d at 55:

> "A motion for new trial is also addressed to the trial court's judicial discretion and its decision will not be set aside unless an abuse of discretion is shown."

See, also, *State v. DePriest*, 206 N.W.2d 859 (N.D.1973); *State v. Carroll*, 123 N.W.2d 659 (N.D.1963); *State v. Brathen*, 77 N.D. 309, 43 N.W.2d 202 (1950); *State v. Hummel*, 73 N.D. 308, 14 N.W.2d 368 (1944).

[8] We have examined the record and find no abuse of discretion. It is not an abuse of discretion on the part of the trial court to deny a motion for a new trial on the ground of insufficiency of the evidence where there is substantial evidence to support the decision. *State v. DePriest*, 206 N.W.2d at 865, *supra*.

The order denying the motion for new trial is affirmed. Olmstead has not shown his entitlement to any relief under the Uniform Post-Conviction Procedure Act (Ch. 29-32, NDCC).

PAULSON, VOGEL and SAND, JJ., and BENNY A. GRAFF, District Judge, concur.

The Honorable RALPH J. ERICKSTAD, deeming himself disqualified did not participate; the Honorable BENNY A. GRAFF, Judge of the Fourth Judicial District Sitting in his place.

STATE of North Dakota,
Plaintiff-Appellee,

v.

Vernon Ray OLMSTEAD,
Defendant-Appellant.

Cr. No. 553

Supreme Court of North Dakota

April 29, 1976

Rehearing Denied June 10, 1976

(242 N.W.2d 644)

Defendant was convicted before the District Court, Grand Forks County, A. C. Bakken, J., of rape in first degree, using a knife to threaten immediate and great bodily harm to victim, and he appealed and moved for release pending determination of appeal. Following denial of that motion by the district court, the Supreme Court, Paulson, J. (on Reassignment), held that nature of offense, use of knife in perpetrating rape, lack of inducement or enticement by victim, psychological evaluation and fact that trial judge had opportunity to observe defendant during trial and form opinion as to his conduct, supported conclusion that there was sufficient reason to believe that defendant might pose danger to others or to community; that trial court did not abuse its discretion in denying motion for release pending appeal; and that motion would be denied by the Supreme Court.

Motion denied.

Vogel, J., filed dissenting opinion.

1. Bail Key 44(3)

As general rule, convicted defendant is entitled to release pending appeal unless it appears that appeal is frivolous, appeal is taken for delay, there is reason to believe defendant might flee, or defendant poses a danger to others or to community.

2. Bail Key 44(1)

When determining whether or not defendant should be released pending appeal, trial judge may properly consider testimony of state's witnesses heard during trial, psychological reports previously submitted during trial and trial judge's own observations of defendant during course of trial.

3. Bail Key 44(3)

Fact that defendant, defendant's wife, and his fellow workers would not feel threatened by defendant's release pending appeal of his conviction of rape in first degree, using a knife to threaten immediate and great bodily harm to victim, although of value to trial court in determining whether or not release should be granted, was not conclusive that others, including victim who testified against him, would not be in danger. NDCC 12-30-01, subds. 1, 4, 12-30-04, subd. 2.

4. Bail Key 44(1)

Decision whether convicted defendant should be released pending appeal is discretionary with trial court and a similar petition made to the Supreme Court will be granted only in case of abuse of discretion by trial court.

5. Bail Key 44(1)

Although it is preferable for the district court to separately state its reasons for granting or denying motion for release pending appeal, and to include therein a clear statement of factual basis for its action, the "Statement of Reasons for Sentence of Imprisonment and Denial of Bail" filed by trial judge in prosecution for rape in first degree, using knife to threaten immediate and great bodily harm to victim, showed that he considered all of information placed before him and, in exercise of sound discretion, denied defendant's motion. NDCC 12-30-01, subds. 1, 4, 12-30-04, subd. 2; N.D.R.App.P., rule 9(b); N.D.R. Crim.P., rule 46(d).

6. Bail Key 44(3)

In prosecuting for rape in first degree, using a knife to threaten immediate and great bodily harm to victim, nature of offense, use of knife in perpetrating rape, lack of inducement or enticement by victim, psychological evaluation, and fact that trial judge had opportunity to observe defendant during trial and form opinion as to his conduct, supported conclusion that there was sufficient reason to believe that defendant might pose danger to others or to community, and consequently trial court did not abuse its discretion in denying defendant's motion for release pending appeal of conviction and defendant's motion would likewise be denied by the Supreme Court. NDCC 12-30-01, subds. 1, 4, 12-30-04, subd. 2.

Syllabus by the Court

1. The decision whether a convicted defendant should be released pending appeal is discretionary with the trial court. A similar petition made to this Court will be granted only in case of an abuse of discretion by the trial court.

2. As a general rule, a convicted defendant is entitled to release pending appeal unless it appears that (1) the appeal is frivolous, (2) the appeal is taken for delay, (3) there is reason to believe the defendant might flee, or (4) the defendant poses a danger to others or to the community.

3. In the instant case, the nature of the offense, the use of a knife in perpetrating the rape, the lack of inducement or enticement by the victim, the psychological evaluation, and the fact that the trial judge had the opportunity to observe the defendant during the trial and form an opinion as to his conduct, support the conclusion that there is sufficient reason to believe that the defendant may pose a danger to others or to the community, and his motion for release pending the appeal of his conviction for rape is denied.

David Kessler, Grand Forks, for defendant-appellant.

Thomas B. Jelliff, State's Atty., Grand Forks, for plaintiff-appellee.

PAULSON, Judge (on Reassignment).

The defendant, Vernon Ray Olmstead, was charged with the crime of "Rape in the first degree", using a knife to threaten immediate and great bodily harm to the victim, in violation of § 12-30-01(1) and (4), and § 12-30-04(2), N.D.C.C. He waived a jury trial, and was convicted and sentenced to five years' imprisonment. He has appealed and has moved for release pending the determination of the appeal. His motion, which was directed to the district court for release pending appeal, was denied.

The conviction was based upon identification by the victim of the rape about two weeks after the event. The defense was

alibi. It is claimed that alibi witnesses who were not available at the time of trial are now available. Some of the confusion in an admittedly confused record is caused by the fact that the defendant hired the attorney who represented him at the trial; defendant's parents hired another attorney who made, and then withdrew, a motion for a new trial; and defendant's wife hired a third attorney, who appears for him in this court. A motion for a new trial made by the second attorney was withdrawn by him, over the objection of the third attorney, when a polygraph examination resulted in a report adverse to the defendant. The present attorney claims that the polygraph evidence was unreliable because of a brain injury suffered by the defendant as a child, resulting in atypical encephalogram readings and difficulties of comprehension in certain areas which make the polygraph readings unreliable. The defendant claims it was error for the court to permit the withdrawal of the motion for a new trial. The motion for a new trial was also based on the availability of additional alibi witnesses not available at the first trial.

[1] In *State v. Stevens*, 234 N.W.2d 623 (N.D.1975), in syllabus paragraphs 2, 3, and 4, we held:

> "2. After a defendant has been convicted, the presumption of innocence no longer applies; on the contrary, there is a strong presumption of guilt. Therefore, a convicted defendant is not entitled as of right to release on bail while the appeal is pending.
>
> "3. As a general rule, a convicted defendant is entitled to release pending appeal unless is appears that (1) the appeal is frivolous, (2) the appeal is taken for delay, (3) there is reason to believe the defendant might flee, or (4) the defendant poses a danger to others or to the community.
>
> "4. The decision whether a convicted defendant should be released pending appeal is discretionary with the trial court."

In the instant case, the State apparently concedes that the appeal is not frivolous and is not taken for purposes of delay. Furthermore, the State does not dispute the conclusion that suitable conditions of release may be imposed which would reasonably assure that the defendant will not flee. However, the State strenuously contends that the defendant should not be released pending his appeal to this Court because there is sufficient reason to believe that the defendant poses a danger to others or to the community.

The district court did not hold a separate hearing on the defendant's motion for release pending appeal, and no separate order denying such motion was entered by the district court. Instead, the district court simultaneously considered the matter of sentencing and the matter of release pending appeal, and entered an order covering both. Such order, entitled "Statement of Reasons for Sentence of Imprisonment and Denial of Bail", reads as follows:

> "The undersigned District Judge certifies that the reasons for the sentence of imprisonment imposed and denial of bail in the event of an appeal in the above-entitled action are shown in the following initialed Sentencing Factors:
>
> "ACB 1. The defendant's criminal conduct caused or threatened serious harm to another person.
>
> "ACB 2. The defendant did not act under strong provocation.
>
> "ACB 3. There were no substantial grounds which tended to excuse or justify the defendant's conduct.
>
> "ACB 4. The victim of the defendant's conduct did not induce or facilitate its commission.
>
> "ACB 5. The defendant's conduct was the result of circumstances likely to recur.

"ACB 6. A current psychological evaluation pertaining to the character, history, and attitudes of the defendant indicate that he presents a picture of an individual who is extremely immature and becomes easily flustered under pressure. He is extremely naive, immature and inadequate. In addition he is extremely uncertain about his sexuality and is suspicious about the motives of others, and that he is likely to commit a similar crime.

"ACB 7. The defendant is particularly unlikely to respond affirmatively to probationary treatment.

"ACB 8. The defendant is neither elderly nor in poor health.

"ACB 9. Confinement is necessary in order to protect the public from further criminal activity by the defendant.

"ACB 10. It would unduly depreciate the seriousness of the offense to impose a sentence other than total confinement.

"Dated this 22nd day of January, 1976.

"[Signed] A. C. BAKKEN
"A. C. Bakken
"Judge of District Court"

It should be mentioned, in explanation of Item 6, that the psychological evaluation referred to contains all of the statements set forth in Item 6 except the last clause "that he is likely to commit a similar crime", which is a conclusory statement by the district judge.

[2, 3] Olmstead, in support of his motion for release pending appeal, offered the testimony of himself, his wife, and fellow workers from the Grand Forks Air Base and from his religious

activity organizations. Olmstead's master sergeant testified that he would like to have Olmstead back in the organization; the head of a religious mission with which Olmstead had been active promised to continue to allow the defendant to work with him in mission work; a lieutenant in the Air Force said he would have no objection to having Olmstead back in his command; and a woman Air Force member who had worked with Olmstead in the same organization for two months said she would be pleased to have him again in the organization. The State called no witnesses and engaged in little cross-examination. However, the district judge, during the trial, also heard the testimony of the State's witnesses; reviewed the psychological reports previously submitted; and had the opportunity to observe Olmstead during the entire course of the trial. Such information is also properly considered when determining whether or not the defendant should be released pending appeal. *State v. Jensen*, Crim.No. 554, 241 N.W.2d 557 (N.D. 1976); Rule 9(b), N.D.R.App.P.; Rule 46(d), N.D.R.Crim.P. The fact that Olmstead, his wife, and his fellow workers would not feel threatened by his release, although of value to the court in determining whether or not release pending appeal should be granted, is not conclusive that others, including the victim who testified against him, would not be in danger.

In an analogous situation presented to the United States District Court for the District of Columbia in *United States v. Thompson*, 294 F.Supp. 879 (D.D.C.1969), the defendant's motion for release pending appeal from a conviction of "armed rape" was denied, even though the defendant had family ties in the community and his prior criminal record was "not exceptional". The federal district court concluded that the present offense (armed rape) and the methods of its commission indicated a violent disposition which resulted in a danger to the complaining witness and to the public generally. The court noted that there were no restrictions which would guarantee

that the defendant would not pose a danger to the community if released pending the disposition of his appeal.

[4] In the instant case, we believe that the district court, based upon the record before it, was acting within its discretion in denying Olmstead's motion for release pending appeal. A similar petition made to this Court will be granted only in case of an abuse of discretion. *State v. Stevens, supra; State v. Schuler,* 236 N.W.2d 631 (N.D. 1975).

[5] Although we would prefer that the district court separately state its reasons for granting or denying a motion for release pending appeal,[1] and include therein a clear statement of the factual basis for its action, we believe that the "Statement of Reasons for Sentence of Imprisonment and Denial of Bail" filed by the trial judge in the instant case shows that he considered all of the information placed before him and, in the exercise of sound discretion, denied Olmstead's motion.

[6] In particular, we conclude that the nature of the crime, the violent method of its perpetration [which included the use of a knife], the lack of inducement or enticement by the victim, and the psychological evaluation showing that the defendant was an individual apparently unable to cope with his sexuality and that such pressures could result in the repetition of a similar episode, are important factors supporting denial of Olmstead's motion. Furthermore, as we said in *State v. Jensen,* Crim.No.554, 241 N.W.2d 557 (N.D.1976):

> "We also take into account the fact that the trial judge had the opportunity . . . to observe the defendant and form an opinion as to his conduct."

We conclude that the record, when taken as a whole, establishes that there is "sufficient reason" to believe that the defendant, if released, would pose a danger to others or to the community.

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[1] Rule 9(b), N.D.R.App.P.; Rule 46(d), N.R.D.Crim.P.; *See United States v. Manarite,* 430 F.2d 656 (2d Cir. 1970).

The defendant's motion for release pending disposition of his appeal is therefore denied.

ERICKSTAD, C. J., and PEDERSON and SAND, JJ., concur.

VOGEL, Justice (dissenting).

I dissent.

I believe the majority opinion goes too far in taking for granted the guilt of the defendant. We said in *State v. Stevens,* 234 N.W. 2d 623 (N.D.1975), that there is a strong presumption of guilt after conviction and pending appeal. But it is still a presumption and not a certainty.

I agree with the statement of Chief Judge Bazelon, of the District of Columbia Court of Appeals, dissenting in *United States v. Stanley,* 469 F.2d 576, 591 (1972):

> "Certainly the act for which a person seeking release stands convicted is relevant in assessing whether the community's safety would be imperiled by release. Here, however, the substantial issues Stanley raises on appeal directly concern whether or not he committed the offense for which he was convicted. In such cases, unlike appeals where the fact of the offense is unchallenged, the inference to be drawn from the guilty verdict is more questionable. And, in Stanley's case, the inference is further attenuated by the almost total absence of prior criminal activity. His only other involvement with the law was a disorderly conduct charge in 1965 which resulted in a ten dollar fine."

In the case before us there is not even a disorderly conduct conviction or a ten-dollar fine. There is a total absence of a criminal record. Olmstead has never even had a traffic ticket.

I believe we have more reason to question the strength of the presumption of guilt where the conviction is based almost entirely upon an eyewitness identification made two weeks after the event. Many scholars and psychologists have commented on the high risk of error involved in eyewitness identification.[1] The risk rises with the delay.

It may be that upon a new trial, if granted, the effect of additional alibi witnesses will negative the identification testimony of the victim.

I think we should also realize, in connection with the identification of the defendant, a young man with a narrow face and a moustache, that the Air Force has regulations as to hair styles and moustaches, and that every Air Force base has hundreds of young men with narrow faces and similar hair styles and moustaches.

I believe that Olmstead could be released pending the appeal with little or no risk of danger to the community. There is no testimony, expert or otherwise, indicating that he represents a significant risk to the public. I would hold, as the Federal courts do (see n. 17, *United States v. Stanley, supra,* majority opinion, at 581), that the trial court must consider and, if feasible, utilize imposition of conditions of release which might reduce flight and danger to acceptable levels. In this case the United States Air Force could, and I believe would, give assurance that Olmstead would not leave the State while

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[1] "Some of the most tragic miscarriages of justice have been due to testimonial errors in this field." Wigmore's *Principles of Judicial Proof* (2d ed. rev.; Boston: Little, Brown, and Company, 1931), p. 428. Wigmore gives many illustrations in § 209.

his appeal is pending, and his associates in his church could, and would, agree to supervise his off-duty activities. If such condition were imposed upon his release, I think the danger to the public would be so slight as to be almost nonexistent. Even without such conditions, I believe the risk would be minimal.

We said in *State v. Stevens, supra,* at 625:

> "It is impossible to lay down specific guidelines for release of persons who have been convicted of crimes and sentenced to imprisonment who choose to appeal the convictions. The facts of each crime differ and the nature of each defendant differs, and consequently the decision must be made in each case on its own facts."

In this case the defendant made an impressive showing that there would be no danger to the public upon his release, and the State took an almost passive attitude at the hearing, offering no evidence. If release is denied pending appeal in this case, I have difficulty conceiving of a case involving conviction of a serious crime where release will ever be allowed.

I would grant the motion for release pending appeal, subject to restrictions such as I have suggested above.

STATE of North Dakota, Plaintiff and Appellee,

v.

Vernon Ray OLMSTEAD, Defendant and Appellant

Cr. No. 553

Supreme Court of North Dakota

Nov. 19, 1976
(246 N.W. 2d 888)

Defendant was convicted in the District Court, Grand Forks County, A. C. Bakken, J., of rape, and he appealed. The Supreme Court, Vogel, J., held that despite disturbing conflicts in the testimony, there was competent and substantial evidence to support the conviction; however, under the circumstances of the case, the trial court abused discretion in refusing to allow the reinstatement of defendant's motion for a new trial.

Remanded for further proceedings.

1. **Criminal Law Key 1159.2(1)**

Reluctance of appellate courts to reverse factual findings of juries or trial judges reflects recognition that truth can better be determined in confrontation of testimony of witnesses appearing in person than from transcript of testimony of those witnesses.

2. **Criminal Law Key 260.11(3)**

In rape prosecution which was tried to the court, determination of defendant's guilt or innocence was a question for the trial judge.

3. **Rape Key 51(1)**

Although conflict in evidence was disturbing, there was competent and substantial evidence to support trial judge's determination that defendant was guilty of rape.

4. **Rape Key 54(1)**

Uncorroborated testimony of rape victim is sufficient to establish any or all elements of rape.

5. Criminal Law Key 948

Under peculiar circumstances of case, trial court abused discretion in refusing to permit reinstatement of defendant's motion for new trial on rape charge where, inter alia, defendant had retained new counsel, who promptly moved to reinstate the motion, on the same day that trial court allowed defendant's then counsel to withdraw new trial motion he had filed and where defendant was confused about proceedings relating to motions and there was evidence that polygraph examination of defendant, the adverse results of which had apparently led defendant's then counsel to withdraw the new trial motion, was unreliable.

Syllabus by the Court

1. Competent and substantial evidence, although controverted, is sufficient to support a conviction upon trial by a court.

2. Uncorroborated testimony of a rape victim as to identification of a rapist is sufficient to support a conviction.

3. Truth can better be determined in the confrontation of the testimony of witnesses appearing in person that from a transcript of the testimony.

4. Under the peculiar facts of the case, it was error to deny a motion to reinstate a motion for new trial.

Thomas B. Jeliff, State's Atty., Grand Forks, for plaintiff and appellee State of North Dakota.

David Kessler, Grand Forks, for defendant and appellant.

VOGEL, Justice.

This case presented the trial judge with a direct conflict between the uncorroborated identification of the defendant as her assailant by a rape victim, and an alibi defense supported by five witnesses. The trial judge believed the victim and found the defendant guilty, in a trial without a jury. The defendant appealed, asserting that the evidence as a matter of law was insufficient to sustain the conviction. We affirm the conviction, but find error in the court's refusal to permit the reinstatement of a withdrawn motion for new trial, and we remand for consideration of that motion.

An earlier appeal, on a motion to release pending this appeal, is reported at 242 N.W.2d 644 (N.D.1976).

The rape victim testified that she was raped in a vacant lot by a young man then unknown to her, on June 27, 1975. She was with him for half an hour, conversed with him, and saw, by the light of the moon, his face, the knife he used to threaten her, and the color of his clothes and boots. About two weeks later, while in a restaurant within a few blocks of the place where the rape occurred, she saw the defendant working in the kitchen and identified him as the rapist. At the trial, her testimony was the only evidence identifying the defendant. A police drawing based upon her description before she identified the defendant shows some similarity to him. A search of the apartment of the defendant and his wife uncovered a steak knife similar to the one described by the victim, but no clothing closely matching her description of what the rapist wore.

The defendant's alibi defense was supported by his wife and by five persons who testified that they had attended a movie and

prayer meeting at the Grand Forks Mission with the defendant and his wife the evening of June 27. The meeting lasted until after midnight. All five testified that the defendant and his wife planned to go to a local carnival to hand out religious tracts, and two of the five testified that they accompanied the defendant and his wife to the carnival and that the four "witnessed" there until after 1 a. m. The rape was positively shown to have occurred between midnight and 1 a.m. When the trial judge announced his decision, he pointed out certain inconsistencies between the testimony of the alibi witnesses, such as a difference in their testimony as to the gate they used to enter the carnival grounds. He deduced that the alibi witnesses were mistaken in their reconstruction of events. (Since the first complaint came about two weeks after the rape, the witnesses had to reconstruct their movements over a period of days or weeks in order to determine what they had been doing on the evening of June 27.)

On the other hand, there were inconsistencies and incongruities in the prosecution's case. For example, the victim testified that the rapist first demanded money from her. Both of the Olmsteads worked, they had no children, and they asserted they were in no particular need of money. She also indicated that the rapist probably was the driver of a yellow Volkswagen which had followed her at a slow speed as she walked along the sidewalk a short time before the rape. The Olmsteads' car was a green Dodge station wagon. The rapist also told the victim that he was wanted by the police. Olmstead had no criminal record prior to the present conviction.

On the question of credibility of witnesses, reading a cold transcript is no substitute for hearing and observing witnesses as they testify. Tones of voice, hesitations, confusion, surprise, and other telltale indications of mental state convey to trial judges and jurors much that is lost to appellate judges. If we were to judge from the cold print, we might decide many cases differently than trial judges do, and this case might be one of them. But,

if we decided differently, we would have no assurance that ours was the better decision. We are reluctant to reverse factual findings of juries or trial judges. Appellate courts have stated in many ways, in both civil and criminal cases, their determination to give respect to the findings of trial judges and juries. Sometime they say they will not reverse if there is substantial evidence to support the verdict [*Kresel v. Giese*, 231 N.W.2d 780, 791 (N.D. 1975)]; sometimes they say they will not substitute their judgment for that of the trial court or jury [*State v. Champagne*, 198 N.W.2d 218, 226 (N.D.1972)]; sometimes they speak of viewing the evidence in the light most favorable to the judgment [*State v. Neset*, 216 N.W.2d 285, 290 (N.D. 1974)]; and sometimes they speak of their great reliance on the findings of the lower court [*In re Estate of Elmer*, 210 N.W.2d 815, 819 (N.D. 1973)].

In criminal cases we have repeatedly held that "at the appellate level we do not substitute our judgment for that of the jury or trial court where the evidence is conflicting, if one of the conflicting inferences reasonably tends to prove guilt and fairly warrants a conviction." *State v. Kaloustian*, 212 N.W.2d 843, 845 (N.D.1973), and cases cited therein; *State v. Neset*, 216 N.W.2d 285, 287 (N.D.1974).

[1] However stated, these rules indicate a recognition that the truth can better be determined in the confrontation of the testimony of witnesses appearing in person than from a transcript of the testimony of those witnesses.

[2, 3] Whichever formulation of the rules is followed, we conclude that the determination of the guilt of the defendant in this case was a question for the trial judge and that there was competent and substantial evidence to support it, and, although we are disturbed by the conflict in the evidence, we cannot say that we are left with a definite and firm conviction that a mistake has been committed. *Scheid v. Scheid*, 239 N.W.2d 833 (N.D.

1976); *Schwartzenberger v. Hunt Trust Estate*, 244 N.W.2d 711 (N.D.1976); *Square Butte Elec. Coop. v. Hilken*, 244 N.W.2d 519 (N.D.1976).

[4] We have held that the uncorroborated testimony of a rape victim is sufficient to establish any or all elements of the crime of rape. *State v. Klein*, 200 N.W.2d 288 (N.D.1972).

[5] The defendant makes the alternative request that we find that the trial court abused its discretion in refusing to permit the reinstatement of a motion for new trial. Under the very peculiar conditions that existed in this case, we agree and remand the case for consideration of the motion for new trial.

At the trial, the defendant was represented by attorney Evan Heustis. After the trial, the defendant's parents retained attorney John Moosbrugger to represent him in the making of a motion for new trial and in appealing. Moosbrugger made a motion for new trial which referred to additional alibi witnesses who could then be produced, and also requested a polygraph examination. Apparently he and the State's Attorney stipulated that the results would be admitted into evidence and the polygraph operator would be produced for examination and cross-examination. After the polygraph tests had been taken, Mr. Moosbrugger moved to withdraw the motion for new trial, apparently for the reason that the defendant was reported by the polygraph operator to have lied. At the moment the court was hearing Mr. Moosbrugger's motion to withdraw the motion for new trial, another attorney, David Kessler, retained by the defendant's wife, was present in the courtroom requesting that the motion not be withdrawn. The court nevertheless granted the motion to withdraw, with the apparent consent of the defendant, who evinced little understanding of the proceedings. Later the same day, the defendant agreed to be represented by Mr. Kessler, who promptly moved to reinstate the motion for new trial. The motion was denied.

A further peculiarity of the proceedings is that the defendant, who had been in the county jail for some time after the conviction, asserted that he had not been allowed to see his wife during that time. Although he stated that he had agreed, until the previous Saturday, to forbid her to see him (the source of the suggestion not being stated), he also said that he had written several letters to her and she had received none.

At the hearing on his motion to reinstate the motion for new trial, Mr. Kessler asserted that he had available expert testimony to show that the polygraph examination of the defendant would be unreliable because of dyslexia, dysgraphia, and dyscalculia due to a serious head injury during childhood.

We believe that the court should not have allowed the withdrawal of the motion for new trial, or, if withdrawn, should have allowed reinstatement when prompt motion for reinstatement was made. The motion to withdraw the motion for new trial was apparently based upon a hearsay report of a polygraph examination, but the motion related to more than the polygraph examination—it also asked for a new trial on other grounds. There was evidence available to the effect that a polygraph examination of the defendant was unreliable. The defendant was confused, and his wife, who had not been allowed to see him, was asking that the motion not be granted. Finally, this is a case where identification by a single eyewitness is involved, and eyewitness identification has been proved many times to be subject to error.

We reverse the order denying leave to reinstate the motion for new trial, and remand for hearing on the same motion for new trial made by Mr. Moosbrugger, subject to the same stipulations made by him and the State's Attorney. The trial court may, of course, in its discretion, allow amendments to the motion or permit other motions to be made.

Remanded for further proceedings consistent with this opinion.

ERICKSTAD, C. J., and PEDERSON, PAULSON and SAND, JJ., concur.

TRANSCRIPT OF TRIAL—JUDGE'S VERDICT—
pp. 376-384

[*376] The Court: In a criminal case such as this whether it's tried to a jury or by the Judge after waiver of jury, the same rules of law apply. In a criminal case the State must prove the charge against the defendant beyond a reasonable doubt and this is a doubt based upon reason arising from a thorough or impartial consideration of all of the evidence in the case. While the jury or the Court cannot convict the defendant on mere surmise or conjecture, neither should the jury or the Court go outside of the evidence to imagine doubts to justify acquittal.

[377] If after a careful deliberation the jury or the Court is convinced to a moral certainty that the defendant is guilty of the crime charged, then the jury or the Court is satisfied beyond a reasonable doubt.

The distinction must be made here between what the requirements of a reasonable doubt from what is sometimes asserted to be beyond all doubt. If the rule required a finding beyond all doubt, of course, there would be no point in trying any criminal case unless we had police officers on the scene or newspapermen with TV cameras and every part of the crime was recorded and I suppose even then there would undoubtedly be claims that you didn't have proof beyond all doubt. That's not the test. The test is beyond a reasonable doubt. Beyond that there are certain essential elements of the offense with respect to rape in the first degree. The burden resting upon the State is satisfied only if the evidence shows beyond a reasonable doubt that the following is essential elements of the offense charged.

One, in applying to this case—No. 1, that the defendant, Vernon Ray Olmstead, had sexual intercourse with the female

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

victim, namely, Theresa Jenkins, on or about the 28th day of June, 1975, in Grand Forks, North Dakota.

Two, that she at the time of the act of sexual intercourse was not the wife of the defendant and she resisted the said act but her resistance was overcome by force or violence.
[378] And three, that the defendant was 20 years of age on or at the time of the commission of the offense.

The jury or Court is also charged to follow specific legal requirements in weighing the evidence. The crime of rape charged in the information is a serious one from the nature of the case. The woman and the accused are usually the only witnesses for these reasons it's the duty of the jury or the Court to weigh the testimony carefully; to criticize all of the circumstances in light of reason and common sense and then determine with deliberate judgment what is the right of the matter on influence by the nature of the charge made against the defendant. The fact that the charge is one of difficulty to disprove should not deter the jury or the Court from returning a verdict of guilt. If the jury or the judge is convinced that the evidence beyond a reasonable doubt is convinced by the evidence by reasonable doubt the defendant is guilty as charged. A fact in dispute may be proved either by direct evidence or circumstantial evidence or both.

Direct evidence such as the credible testimony of an eye witness is this sort which directly proves a fact in dispute without the aid of an inference and which in itself, if true, establishes the fact.

Circumstantial evidence consists of fact and circumstances in the case from which the judge or the jury may reasonably infer the existence of a fact in dispute.

[379] An instruction which certainly has great importance in this case relates to weight and credibility of testimony given by witnesses.

The jury or the Judge in this case is the judge of all questions of fact. The jury or the Judge alone must weigh the evidence

under these instructions and determine the credibility of those who have testified. And in performing this task the jury or the Judge may consider those facts and circumstances in the case which tend to strengthen, weaken or contradict one's testimony. The jury or the Judge may consider the age, intelligence and experience of the witness, the strength or weakness of his recollection, how he came to know the facts to which he testified, his possible interest in the outcome of the trial, any bias or prejudice he may have, his manner and appearance, and whether he was frank or evasive while testifying, and whether his testimony is reasonable or unreasonable.

If it's found that there is a conflict in the evidence, the Judge or the jury should reconcile it, if it's possible, because each witness is presumed to have told the truth. If this cannot be done, the jury or the Judge has the right to determine whom of the witnesses he will believe in whole or in part. And I believe this should be emphasized, that the jury or the Judge should give credible testimony its just and fair weight and should consider the evidence in the case in the light of his common sense and ordinary experience and observation **[380]** of human affairs. If the Jury or the Judge concludes that a witness has knowingly testified falsely concerning any material matter, he has the right to distrust such witness's testimony in other particulars and may reject all the testimony of that witness and give it such weight and credibility as he thinks it deserves.

The test is not which side produces the greater number of witnesses or presents the greater quantity of evidence, but rather which testimony and what evidence convinces the jury or the Judge as being more accurate and otherwise trustworthy.

What I have read is a summary of the basis rules of law which apply in a criminal case such as this. The facts that the complainant, Theresa Jenkins, had a phone conversation with her husband which ended June 27, 1975, at approximately 11:50 p.m. She returned to the Belmont Lounge after going to 1116-

26th Avenue South and after the crime had been committed arriving at the Belmont Lounge at approximately 1:00 a.m., June 28, 1975, and shortly thereafter she was taken to the United Hospital and it was confirmed that she had been raped. This confirmation having been introduced in evidence by an exhibit by the State, and the time she was there was approximately 1:30 a.m. and for some time thereafter the complaining witness, Thereas Jenkins, testified as to a positive identification of the defendant. She testified that this was under conditions of moon **[381]** light, that a full moon had occurred four or five days prior to June 28, 1975, and that identification of the defendant was followed up by a composite drawing which was made by the police department upon information provided by the complainant. This was received as State's Exhibit No. 4 and prior to that or in connection with the investigation another composite drawing had been made based on information furnished by the complainant and used in connection with investigation and also with the search warrant and warrant of arrest papers and a reasonable interpretation of these composite drawings must be that they are very similar to the very distinct characteristics of the defendant.

In addition to the composite drawing, the defendant, or rather the complainant testified as to a positive identification of the defendant at the Cape Codder Restaurant when she went there approximately two weeks later. She also testified accurately as to the description of a knife which was introduced in evidence as to the length of the knife, the wooden handle, the grooves for the fingers, and also as to the point at the end of the knife being broken off. She also testified as to boots the defendant was wearing. There was one matter as to the color of the clothes that did not correspond to these boots being black. However, in regard to the boots, she testified that she saw the top of them when the defendant had or the assailant had dropped his drawers and she could not see all **[382]** of the boots but saw the tops of them and also that the boots had zig zag cleats on the bottom.

She went back the next morning and observed the scene and observed the zig zag foot prints in the ground at the scene.

The police officers interviewed the complaining witness on at least two occasions and found no inconsistencies in her statement.

In regard to the defense's testimony, the chief witness for the defense was the defendant's wife Lana Olmstead. She testified as to having reconstructed events during the month of June, 1975. She gave different versions to the Grand Forks Police Department of the defendant's activities during the night of June 27th and the morning of June 28th. These covered such things as hunting night crawlers, to being at the Country Kitchen, to a trip to Winnipeg.

The defense was finally centered on the testimony that the defendant and his wife went to the Mission coffee house at approximately 10:00 p.m. on June 27th, 1975, that they were there until approximately 12:15 a.m. on June 28, 1975, when they, in agreement with others at the Mission coffee house, decided to go out to the carnival on the Grand Fork Fairgrounds and witness for the Lord. That she and the defendant returned to their apartment between 1:45 and 2:00 a.m. on June 28, 1975, that immediately thereafter returning, the defendant left the apartment and was gone approximately fifteen minutes.

[383] The other witnesses for the defendant corroborated that he was at the Mission coffee house during the evening of June 27, 1975. There were inconsistencies in the testimony relating to time of day in spite of unusual specific checking of wrist watches. There were also inconsistencies to the parking of the vehicles at the fairgrounds. The testimony shows that the group involved in the Mission coffee house has been in close association and contact for several months. That they visited in the home of the defendant and his wife and as I read before from the rules of law, the Court must follow these facts and this must be considered when one looks to any possible interest in the outcome of the trial.

The Court, if there is a conflict in the evidence, which is obvious, it must be reconciled if possible because each witness is presumed to have told the truth. If it cannot be reconciled, the Judge has the right to determine whom he will believe in whole or in part.

The Court is of this opinion that this evidence can be reconciled in part. It can be reconciled by accepting the testimony of the defendant's wife and corroborating witnesses as to the defendant being at the coffee house on the night of June 27, 1975. It cannot be reconciled as to the time factor. It's the Court's opinion that testimony as to going out to the carnival to witness for the Lord after 12:15 a.m. is incredible and defines common sense beyond good judgment. Carrying that **[384]** a step further if there was any witnessing done for the Lord out at the carnival setting that evening, the only reconciliation that is reasonable is that such time for the defendant and his wife to return to their apartment. The defendant's wife testified he left the apartment and the witness Sissy Williams, I believe, testified that he came to her apartment and knocked on the door about 1:30 that morning of June 28th and that he stayed there a half an hour and the Court asked her specifically what was the urgency of his visit. She said to tell her to pray for some homosexual and for someone who was deadly ill from cancer and this witness Williams had met this woman only very briefly on one occasion.

It appears to the Court that this was an attempt on the part of the defendant to establish an alibi and to account for his time.

Based upon the findings of the Court upon all the evidence presented, it is the finding of the Court in the above-entitled action, State of North Dakota vs. Vernon Ray Olmstead, that the defendant is guilty of the crime of first degree rape as charged in the criminal Information.

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